

ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

31 January 2006 \*

In Case T-48/03,

**Schneider Electric SA**, established in Rueil-Malmaison (France), represented by, initially, A. Winckler, M. Pittie and É. de La Serre, lawyers, then by M. Pittie and A. Winckler,

applicant,

v

**Commission of the European Communities**, represented by, initially, P. Oliver and F. Lelièvre, then by P. Oliver and O. Beynet, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment, first, of the Commission's decision of 4 December 2002 opening the detailed examination phase of the concentration between

\* Language of the case: French.

Schneider and Legrand (Case COMP/M.2283 — Schneider/Legrand II) and, second, of the Commission's decision of 13 December 2002 closing the control procedure in respect of that transaction,

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: H. Legal, P. Mengozzi and I. Wiszniewska-Białecka, Judges,  
Registrar: E. Coulon,

makes the following

**Order**

**Background to the dispute**

- <sup>1</sup> In accordance with Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, corrected version in OJ 1990, L 257, p. 13, as amended by Council Regulation (EC) No 1310/97 of 30 June 1997, OJ 1997 L 180, p. 1; 'Regulation No 4064/89'), Schneider Electric SA ('Schneider' or 'the applicant') and Legrand SA, two undertakings established in France whose business is in products in the electricity distribution sector, notified the Commission on 16 February 2001 of Schneider's proposal to make a public exchange offer in respect of all the shares in Legrand ('the transaction').

- 2 As set out in paragraph 1.7 of the letter of 12 January 2001 which was exchanged by the chairmen of the two companies:

‘...

[Schneider] and Legrand will use their best endeavours to obtain the European Commission’s authorisation as soon as possible and furthermore will adhere to the following principles in the context of the examination procedure undertaken by the European Commission in respect of the merger of [Schneider] and Legrand:

...

- iv) The Chairman of the Board of Legrand will be personally involved in drawing up any solution that is put to the European Commission, in particular where authorisation of the transaction by the Commission is conditional upon certain divestitures.
  
- v) Neither company may propose or approve any commitment involving Legrand, in particular any divestiture commitment relating to one or more assets (including shareholdings) held by Legrand or any of its subsidiaries, without the prior agreement of the Chairmen of the Boards of Schneider and Legrand in the pursuit of an even-handed divestiture solution as between the two groups.

...’

- 3 On 30 March 2001 the Commission opened the detailed examination phase of the transaction under Article 6(1)(c) of Regulation No 4064/89.
  
- 4 Since Article 7(3) of Regulation No 4064/89 permits the implementation of notified public exchange offers, provided that the voting rights attached to the shares acquired are not exercised, Schneider launched its public offer for the exchange of shares on 21 June 2001 and closed it on 25 July 2001.
  
- 5 On 6 August 2001 the Commission des Opérations de Bourse (Stock Exchange Commission) announced the final outcome of Schneider's public offer for Legrand shares. Schneider thus acquired 98.7% of the shares in Legrand, but without being able to exercise the corresponding voting rights.
  
- 6 Having twice rejected the corrective measures proposed by Schneider to make the transaction compatible with the common market, the Commission, by decision of 10 October 2001 adopted on the basis of Article 8(3) of Regulation No 4064/89, declared the transaction to be incompatible with the common market ('the prohibition decision').
  
- 7 Following the request made by Schneider on 22 November 2001, the Commission adopted a decision on 4 December 2001 which authorised Schneider, on the basis of Article 7(4) of Regulation No 4064/89, to exercise the voting rights attaching to its shareholding in Legrand through a trustee appointed by Schneider and subject to conditions laid down in an agreement approved by the Commission.
  
- 8 On 10 December 2001 Schneider and Salustro Reydel Management, the trustee, entered into an agreement for the appointment of the trustee.

- 9 On 13 December 2001, Schneider brought an action for annulment of the prohibition decision before the Court of First Instance (Case T-310/01).
- 10 As the prohibition decision was taken after the merger of the two undertakings, the Commission adopted a decision under Article 8(4) of Regulation No 4064/89 on 30 January 2002 ordering Schneider to divest itself of Legrand within nine months, expiring on 5 November 2002, and prohibiting Schneider from entering into discrete transactions to divest itself of certain of Legrand's businesses ('the divestiture decision').
- 11 On 18 March 2002 Schneider brought an action for annulment of the divestiture decision (Case T-77/02) and made an application for suspension of the operation of that decision (Case T-77/02 R).
- 12 After the interim measures hearing on 23 April 2002, the Commission agreed, at Schneider's request, to extend until 5 February 2003 the period within which the divestiture was to take place.
- 13 As a result, Schneider withdrew its application for suspension of the operation of the divestiture decision.
- 14 Schneider prepared to implement the transfer process in the event that its applications should be dismissed, on the basis that the uncertainty as to Legrand's fate could not be extended beyond 10 December 2002.

- 15 On 26 July 2002 Schneider entered into an agreement with a consortium comprising the companies Wendel Investissements and Kohlberg Kravis Roberts & Co. ('the Wendel/KKR consortium') for the transfer of Legrand ('the transfer agreement'). That agreement, which was to be performed no later than 10 December 2002, included a clause allowing Schneider to cancel the transfer by 5 December 2002 in consideration of payment of damages for breach of contract of up to EUR 180 million, in the event that the Court of First Instance should annul the prohibition decision.
- 16 On 12 September 2002 Schneider notified the Commission of its transfer proposal.
- 17 On 14 October 2002 the Commission declared the proposed transfer to be compatible with the common market.
- 18 By judgment delivered on 22 October 2002 in Case T-310/01 *Schneider Electric v Commission* [2002] ECR II-4071 ('*Schneider I*'), the Court of First Instance annulled the prohibition decision.
- 19 In paragraphs 464 and 465 of *Schneider I*, the Court stated:

'464 Under Article 233 EC, it is incumbent upon the Commission to take the necessary measures to comply with this judgment.

465 Such measures to comply with the judgment must have regard to the grounds constituting the essential basis for the operative part of the judgment (see Joined

Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others v Commission* [1988] ECR 2181, paragraph 27). The relevant grounds of this judgment require, in particular, that if the Commission should resume its examination of the compatibility of the transaction, Schneider should be placed in a position, as regards the affected national sectoral markets in respect of which the economic analysis in the [prohibition decision] has not been rejected, i.e. the French sectoral markets, to put forward a proper defence and, where appropriate, to propose corrective measures addressing the objections made and previously indicated by the Commission.'

- 20 By judgment delivered on 22 October 2002 in Case T-77/02 *Schneider Electric v Commission* [2002] ECR II-4201 (*Schneider II*), the Court of First Instance consequently annulled the divestiture decision, since it was a measure giving effect to the annulled prohibition decision.
- 21 The Commission published in the *Official Journal of the European Communities* a notice concerning the resumption of the control procedure in respect of the transaction (OJ 2002 C 279, p. 22). The notice stipulated that, pursuant to Article 10(5) of Regulation No 4064/89, the time-limits of the examination of the concentration would start again from 23 October 2002, the day after delivery of the judgment annulling the prohibition decision in Case T-310/01. The Commission stated also that following a preliminary examination the transaction could fall within the scope of Regulation No 4064/89, but that the final decision on this point was reserved. It invited interested third parties to submit any observations on the transaction.
- 22 By letter dated 13 November 2002 the Commission informed Schneider that the transaction could affect competition on the French sectoral markets due to the overlapping of significant market shares of Schneider and Legrand, the end of competition between them, the scope of trade marks held by the undertakings concerned, the power over wholesalers of the entity formed by Schneider and Legrand and the fact that it would be impossible for any competitor to substitute itself for the competitive pressure that Legrand exercised before the transaction was completed.

- 23 On 14 November 2002 Schneider submitted to the Commission a proposal for corrective measures aimed at removing the overlap in the businesses of Schneider and Legrand in the affected French sectoral markets.
- 24 The Commission undertook a market survey of Schneider's competitors and customers to test the effect of the proposed corrective measures. The deadline for reply to the questionnaires sent as part of that survey was fixed as 22 November 2002.
- 25 By letter of 25 November 2002 Schneider pointed out to the Commission that, given the lack of a market-by-market examination of the effects of the transaction, the nature and scope of the objections put forward by the Commission in its letter of 13 November 2002 remained imprecise and in no way indicated the existence of any anti-competitive effect on the affected markets. Furthermore, the Commission's general arguments were shown to be unfounded. Schneider therefore claimed that the Commission's objections should be dismissed.
- 26 On 27 and 29 November 2002 Schneider submitted new proposals to supplement its corrective measures.
- 27 By judgment of 29 November 2002 handed down in interlocutory proceedings on appeal from a decision of the Tribunal de Commerce de Nanterre (Nanterre Commercial Court) in an application for interim measures, the Cour d'Appel de Versailles (Versailles Appeal Court) held that the transfer proposals put forward by Schneider had not been submitted for prior approval by Legrand's Chairman, contrary to the provisions of paragraph 1.7 of the letter of 12 January 2001 referred to in paragraph 2 above. The Cour d'Appel therefore ordered Schneider to withdraw the transfer proposals which Legrand's Chairman had not approved.



- 28 By letter of 29 November 2002 the Commission informed Schneider that the corrective measures proposed were not sufficient to remove all the competition problems associated with the transaction, owing to continuing doubts about the viability and autonomy of the businesses transferred and to the corrective measures not being capable of establishing a competitive force that could stand up to the position of the entity formed by Schneider and Legrand.
- 29 By letter of 2 December 2002 Schneider accused the Commission of casting doubt on the viability and ability of the proposed corrective measures to ensure that the competitive position on the affected French markets was maintained. According to Schneider, at the very advanced stage reached in the procedure, the Commission's stance made further debate unrealistic. Consequently, in order to end the uncertainty to which Schneider and Legrand regarded themselves as having been subject for over a year, Schneider informed the Commission that it had decided to proceed with the sale of Legrand to the Wendel/KKR consortium.
- 30 By fax dated 3 December 2002 Schneider confirmed to the Commission that it had decided to proceed with the sale of Legrand to the Wendel/KKR consortium. Schneider stated on that occasion that, under the terms of the sale contract dated 26 July 2002, it did not need to take any action to complete the sale and completion would take place on 10 December 2002.
- 31 By letter of 4 December 2002 the Commission confirmed to Schneider that its proposals for corrective measures did not, at that stage in the procedure, remove the serious doubts raised as to the compatibility of the transaction with the common market, owing to its effect on several French sectoral markets. The Commission therefore declared that it would initiate the detailed examination phase of the transaction under Article 6(1)(c) of Regulation No 4064/89.

32 On 10 December 2002 Schneider transferred its shares in Legrand to the Wendel/KKR consortium.

33 Since Schneider no longer controlled Legrand and the control procedure in respect of the transaction had therefore become devoid of purpose, the Commission informed Schneider by letter dated 13 December 2002 of the closure of that procedure.

### **Procedure and forms of order sought**

34 Schneider brought the present action by application lodged at the Registry of the Court of First Instance on 10 February 2003.

35 On 16 April 2003 the Commission lodged an objection as to the admissibility of the action on the basis of Article 114 of the Rules of Procedure of the Court of First Instance.

36 Schneider submitted its observations on that objection on 18 June 2003.

37 By application lodged on 10 October 2003 and registered as Case T-351/03, Schneider also brought an action for compensation for the loss which it claimed to have suffered as a result of the unlawfulness formally established by the Court in *Schneider I*, the effects of which had been aggravated by irregularities in the administrative procedure resumed by the Commission following the judgments in *Schneider I* and *Schneider II*.

38 The applicant claims that the Court should:

- declare the application admissible;
  
- annul the decision contained in the Commission’s letter of 4 December 2002 opening the detailed examination phase provided for in Article 6(1)(c) of Regulation No 4064/89, and also the decision contained in the Commission’s letter of 13 December 2002 informing Schneider of the closure of the control procedure in respect of the transaction;
  
- order the Commission to pay the costs.

39 The Commission contends that the Court should:

- dismiss the application as inadmissible;
  
- order the applicant to pay the costs.

## Law

40 Under Article 114 of the Rules of Procedure if, as in the present case, one party applies for a decision on admissibility, the Court of First Instance is to make a decision without going to the substance of the case. According to Article 114(3), the remainder of the proceedings are to be oral unless the Court of First Instance decides otherwise. In the present case, the Court considers that it has sufficient

information in the documents and explanations provided by the parties during the written procedure. The Court, having all the evidence required in order to give a ruling, therefore decides that it is not necessary to hear the parties' oral submissions.

*Admissibility of the action in so far as it seeks annulment of both contested measures simultaneously*

- 41 The Court notes, as a preliminary point, that an applicant is in principle entitled, as in the present case, to challenge two measures by a single application (see, to that effect, Case 18/57 *Nold v High Authority* [1959] ECR 41).
- 42 It follows that the present action is admissible in so far as it seeks the annulment of both measures simultaneously.

*Merits of the objection of inadmissibility*

- 43 In support of its objection of inadmissibility the Commission submits, first, that the two contested measures cannot be the subject of an action for annulment and, second, that the applicant does not have any legal interest in bringing annulment proceedings.
- 44 In that regard, it must be noted as a preliminary point that, according to settled case-law, a natural or legal person may, pursuant to the fourth paragraph of Article 230 EC, challenge only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change

in his legal position (see the Order of the Court of First Instance in Case T-167/01 *Schmitz-Gotha Fahrzeugwerke v Commission* [2003] ECR II-1873, paragraph 46, and the case-law cited).

- 45 In the case of acts adopted by a procedure involving several stages of an internal procedure, in principle an act is open to challenge only if it is a measure which definitively lays down the position of the institution on the conclusion of that procedure, and not a provisional measure that is intended to pave the way for the final decision, and whose legal defects could reasonably be raised in an action against it (Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraphs 10 to 12, and Case T-186/94 *Guérin Automobiles v Commission* [1995] ECR II-1753, paragraph 39).
- 46 Further, a natural or legal person has a legal interest in bringing an action against a measure only if the annulment of that measure is of itself capable of having legal consequences (see Case 53/85 *AKZO Chemie v Commission* [1986] ECR 1965, paragraph 21).
- 47 It is necessary, therefore, to consider whether the two contested measures affect the interests of the applicant by bringing about a distinct change in its legal position and as such are measures which adversely affect the applicant.

Admissibility of the action in so far as it relates to the decision of 4 December 2002 to open the detailed examination phase in respect of the transaction

— Arguments of the parties

- 48 The Commission submits that, in line with the preliminary position adopted by the Commission on the basis of Council Regulation No 17: First Regulation

implementing Articles [81] and [82] of the EC Treaty (OJ, English Special Edition 1959-62, p. 87) (Case T-95/99 *Satellimages TV5 v Commission* [2002] ECR II-1425), the contested measure is provisional in nature only in that it confirms doubt as to the compatibility of the transaction with the common market and consequently opens the detailed examination phase pursuant to Article 6(1)(c) of Regulation No 4064/89.

49 The contested measure is thus distinguishable from certain definitive binding measures by which the Commission determines the applicability of Regulation No 4064/89 (Case T-3/93 *Air France v Commission* [1994] ECR II-121), from the Community competition rules (Case 77/77 *BP v Commission* [1978] ECR 1513 and Joined Cases T-125/97 and T-127/97 *Coca-Cola v Commission* [2000] ECR II-1733) and from the Community rules on State aid (Case C-312/90 *Spain v Commission* [1992] ECR I-4117 and Case C-400/99 *Italy v Commission* [2001] ECR I-7303).

50 The extension of the suspension of the transaction and of the undertakings' duty to co-operate with the Commission, which necessarily follows from the opening of the detailed examination phase, is simply akin to the ordinary effects of any procedural step and, apart from the procedural aspect, does not affect the applicant's legal position (*IBM v Commission*, cited above, paragraph 17).

51 Schneider is wrong to argue that the restrictions imposed by the agreement of 26 July 2002 to transfer Legrand transformed the contested measure into a decision prohibiting the transaction. First, the nature of a decision is determined by its legal basis and not by the specific circumstances of each case. Second, Schneider entered into the agreement freely, as the period within which it was to implement the divestiture decision was due to expire on 5 February 2003.

- 52 Although the Commission indicated to Schneider that it was not relieved of the requirement to proceed with preparations for the transfer of Legrand in spite of bringing the action for annulment of the prohibition decision (Case T-310/01) and the divestiture decision (Case T-77/02), Schneider was not compelled to conclude a transfer agreement before delivery of the judgments concerned, which was expected in September or October 2002. Furthermore, Schneider was perfectly entitled to make the sale of Legrand subject to the suspensive condition of a final decision by the Commission declaring the transaction compatible with the common market.
- 53 Lastly, the Commission queries how the applicant can still have a legal interest in challenging the contested measure when, even before its adoption, it had irrevocably abandoned the transaction by proceeding with the final transfer of Legrand without retaining control of it.
- 54 Schneider's objection is that, regardless of the characterisation of the contested measure as a step in procedure or as a decision, it had the effect not only of opening the detailed examination phase as to the compatibility of the transaction with the common market, but also of determining definitively that Regulation No 4064/89 was applicable to the transaction, of prohibiting any implied authorisation of the transaction, of suspending the implementation of the transaction for at least four further months, of placing the notifying parties under an obligation to cooperate with the Commission during the detailed investigation and, lastly, of laying down binding and defective measures of compliance with the judgments in *Schneider I* and *Schneider II*.
- 55 In particular, after over a year and half of uncertainty and significant offers of corrective measures, the contested measure deprived the applicant of the opportunity of taking control of Legrand within a reasonable time. Maintaining the suspension of the transaction had a prejudicial effect, if only in keeping at the head of Legrand a general management with personal interests that conflicted directly with those of its shareholders.

- 56 The transfer agreement required Schneider to exercise its right of cancellation by no later than 5 December 2002, which in practice was the last day on which the Commission could take a decision on the basis of Article 6(1) of Regulation No 4064/89. Having become aware of the time-limit and of the importance of the amount of the indemnity clause when examining the transfer agreement, the Commission could not fail to be aware that the effect of the contested measure adopted on 4 December 2002 would be to prevent the transaction from proceeding once and for all.
- 57 The effects of the contested measure are thus comparable to those produced by decisions which, in relation to State aid, involve suspending the payment of finance and preventing the State to which such a decision is addressed from paying the proposed aid before the procedure has culminated in a final decision.
- 58 Lastly, Schneider considers that, despite the abandonment of the transaction required by the Commission, it retains its interest in seeking annulment of the disputed measure. Schneider waived its right to invoke the cancellation clause in the transfer agreement only because it already knew that the Commission would adopt a decision prohibiting the transaction as a matter of fact if not law.

#### — Findings of the Court

- 59 Under Article 10(5) of Regulation No 4064/89, where the Court of Justice delivers a judgment annulling the whole or part of a Commission decision taken under that regulation, the periods laid down in the regulation are to start again from the date of the judgment.



- 60 According to Article 10(6), where the Commission has not taken a decision pursuant to Article 6(1)(b) or (c) or Article 8(2) or (3) within the deadlines set in Article 10(1) and (3) respectively, the concentration is to be deemed to have been declared compatible with the common market, without prejudice to Article 9.
- 61 It follows that, in relation to the transaction, the statutory time-limits applicable to the control of concentrations started again from 22 October 2002, the date of the judgment annulling the prohibition decision at issue in Case T-310/01.
- 62 Consequently, the Commission had either one month or six weeks from 22 October 2002 to resume the procedure pursuant to Article 6(1) of Regulation No 4064/89, or four months to adopt a decision pursuant to Article 8(3), before an implied decision as to the compatibility of the transaction would be deemed to be taken in favour of the notifying undertakings.
- 63 By adopting the decision on 4 December 2002 to open the detailed examination phase in respect of the transaction pursuant to Article 6(1)(c) of Regulation No 4064/89, the Commission put itself in a position where it was necessary, following delivery of the annulment judgment, to resume the procedure from initial examination of the notification.
- 64 In the circumstances of the present case, such a choice could affect the position of the notifying undertakings only in terms of the necessary consequences of applying Council Regulation No 4064/89.

65 First of all, if the Commission had chosen the other option referred to in paragraph 62 above, and taken the view that annulment of the prohibition decision had entailed the resumption of the procedure within the detailed examination phase without the need for a new decision to resume the procedure, it would, in order to carry out that examination, have had a statutory period of four months within which to adopt its decision, taking possible suspensions into account.

66 The date by which the agreement concerning the transfer of Legrand to the Wendel/KKR consortium had to be implemented was contractually fixed as 10 December 2002, considerably before the end of the period of four months from delivery of the annulment judgment.

67 As a result, even if the contested decision resulted in the four-month time-limit starting from 4 December 2002 rather than from the earlier date of 22 October, it could not significantly alter Schneider's position with regard to the time-limits to be complied with during the procedure, if 10 December 2002 is taken as the reference date.

68 Next, the chronology of events following the annulment of the prohibition decision demonstrates that the contested decision could not have affected the applicant's legal position.

69 Schneider was no longer obliged to give effect to the (annulled) divestiture decision of 30 January 2002 after delivery of the judgment in *Schneider II*, following the

annulment, by the judgment in *Schneider I*, of the decision declaring the transaction incompatible with the common market, as to which the divestiture decision constituted an implementing measure.

- 70 Furthermore, after the Commission's resumption of the control procedure in respect of the transaction and on the basis of the complaints already specified by the Commission, it was for Schneider to propose to the Commission a transfer of assets that could make the transaction compatible with the common market for the affected national sectoral markets in respect of which the economic analysis contained in the prohibition decision had not been rejected by the Court, namely the French sectoral markets (see paragraph 19 above).
- 71 Moreover, that is what the applicant did, by putting forward on 14 November, then on 27 and 29 November 2002, corrective measures intended to avoid the overlaps in the affected markets, in response to the Commission's letter of 13 November 2002 setting out its complaints (see paragraphs 22, 23 and 26 above).
- 72 However, by letter of 2 December 2002, Schneider informed the Commission of its decision to complete the sale of Legrand to the Wendel/KKR consortium, thereby abandoning its right to invoke the cancellation clause in the transfer agreement. Schneider confirmed its decision to the Commission by fax of 3 December 2002, stating on that occasion that it did not need to take any further action to complete the sale of Legrand to the Wendel/KKR consortium.
- 73 Thus, even before the adoption of the contested measure, Schneider spontaneously decided to complete the sale of Legrand to the Wendel/KKR consortium, thereby making continuation of the control procedure in respect of the transaction devoid of purpose.

- 74 It follows that as the transfer had, in the applicant's own words, become irrevocable even before the date of adoption of the contested decision, the decision could not have influenced the abandonment of the transaction.
- 75 For the purposes of this dispute, it is irrelevant that Schneider was, by its own account, committed to the transfer of Legrand as a result of the conditions imposed by the Commission or that it was impossible for Schneider, without the agreement of Legrand's Chairman, to propose the corrective measures needed to secure the Commission's approval of the transaction.
- 76 Although any flaw in the Commission's conduct in that regard may constitute an effective argument for the purpose of establishing whether the Commission may have caused the Community to incur non-contractual liability vis-à-vis Schneider, it is not sufficient to make the decision to open the detailed examination procedure an act adversely affecting Schneider.
- 77 Schneider's claim that it had abandoned its right to invoke the cancellation clause in the transfer agreement only because it already knew that the Commission would adopt a decision prohibiting the transaction in practice is equally irrelevant.
- 78 By adopting the contested decision, the Commission effectively confined itself to confirming the serious doubts which it continued to entertain as to the compatibility of the transaction with the common market and, as a result, to opening the detailed

examination phase under Article 6(1)(c) of Regulation No 4064/89 that would enable it to resolve that issue.

- 79 Finally it may be observed, for the sake of completeness, that the decision adopted on 4 December 2002 to open the formal examination procedure is simply a preparatory step whose sole aim is to undertake enquiries intended to identify the matters which will allow the Commission to rule, by means of a final decision at the end of that procedure, on the compatibility of the transaction with the common market.
- 80 It is true that the disputed measure involves extending the suspension of the transaction under Articles 7 and 10 of Regulation No 4064/89, as well as Schneider's obligation to cooperate with the Commission during the detailed examination phase.
- 81 Nevertheless, those consequences, which flow directly from Regulation No 4064/89 and are naturally induced by the prior control of the compatibility of the transaction that results from the notification thereof by the undertakings concerned, amount to no more than the ordinary effects of any procedural step and do not therefore affect Schneider's legal position (see, to that effect, *IBM v Commission*, cited above, paragraph 17 et seq.) apart from the procedural aspect arising under the provisions of Regulation No 4064/89.

- 82 It is not because of the adoption of the contested measure, but because of the suspensory effect associated with notification by the provisions of Regulation No 4064/89 that Schneider was deprived, as it claims, of the opportunity of taking control of Legrand within the desired period, and was faced with maintaining at the head of Legrand a general management with different interests from those of its shareholders.
- 83 Schneider cannot therefore reasonably maintain that the adoption of the contested measure prevented the implied authorisation of the transaction, which would otherwise have been deemed to have been obtained under Article 10(6) of Regulation No 4064/89 upon expiry on 5 December 2002 of the period within which the Commission could initiate the detailed examination phase.
- 84 It follows that the decision of 4 December 2002 cannot be regarded as an act adversely affecting the applicant.
- 85 Such a conclusion is not affected by the applicant's argument that the contested measure is comparable to a decision to carry out a control procedure in respect of State aid under Article 88(2) EC.
- 86 Where such a decision characterises, even provisionally, a State measure that is in the process of being implemented as new aid, even if the Member State concerned is unlikely to agree with that classification, the effect is to place that Member State

under an obligation — one that does not flow directly from the EC Treaty — to modify its conduct by suspending the implementation of that measure (see *Spain v Commission*, cited in paragraph 49 above, paragraphs 20 and 24, and *Italy v Commission*, cited in paragraph 49 above, paragraphs 56 to 59).

87 By contrast, the contested measure does not, in itself, impose any behavioural obligation which has not already been induced by the notification of the concentration to the Commission on the initiative of the undertakings concerned.

88 Given that the effects of the contested measure on Schneider's procedural position do not exceed the parameters of the provisions of Regulation No 4064/89, the legality of which is not disputed by Schneider, the latter's argument as to the possible lack of a remedy against the contested measure cannot be upheld either.

89 The Court notes that, if it had cause for complaint, Schneider would have been entitled in any event, once the control procedure in respect of the transaction had been completed, to bring an application before the Community Court for annulment of the final decision as to the compatibility of the transaction with the common market, had it not abandoned the transaction during the control procedure by selling Legrand to the Wendel/KKR consortium, thereby leading the Commission to close the procedure without adopting any such final decision.

90 In doing so, Schneider deprived itself of the opportunity to challenge the possible unlawfulness of the measure now contested as a preliminary point in support of an

action which it could have taken against such a final decision if it had not abandoned the transaction.

- 91 The application must therefore be dismissed as inadmissible in so far as it is directed against the decision of 4 December 2002 opening the detailed examination phase in respect of the transaction.

Admissibility of the application in so far as it relates to the decision of 13 December 2002 closing the control procedure in respect of the transaction

— Arguments of the parties

- 92 According to the Commission, Schneider has failed to establish that its legal position has been significantly altered by the step taken on 13 December 2002 of closing the control procedure in respect of the transaction.

- 93 The effect of Schneider's transfer of Legrand was not only to release the Commission from the obligation of ruling on the compatibility of the transaction with the common market, but also to make it impossible to adopt such a decision, or even to pursue an investigation that no longer had any purpose. The real decision was Schneider's decision to abandon the transaction by disposing of Legrand. The Commission did no more than take formal notice of that and inform Schneider that it was closing its file. A letter that merely provides information cannot have legal effects and may not therefore be the subject of an action for annulment (Order of the Court of First Instance in Case T-182/98 *UPS Europe v Commission* [1999] ECR II-2857, paragraph 44).



- 94 Schneider, which stresses that it did not withdraw the notification of the transaction, takes the opposite view that the act of closure may be the subject of an action for annulment in that the Commission, which is empowered to find that there has been an infringement and to impose a sanction in respect of it, necessarily adopts a measure producing legal effects when it terminates the investigation initiated upon a complaint. Letters closing a file may be the subject of an action, since they have the substance and effects of a decision in that they terminate the investigation which has been undertaken (Order of the Court of First Instance in Case T-59/00 *Compagnia Portuale Pietro Chiesa v Commission* [2001] ECR II-1019, paragraph 42).
- 95 Furthermore, if Schneider could not challenge the lawfulness of the closure decision and, in that context, plead the unlawfulness of the decision to initiate the detailed investigation procedure, it would be deprived of any legal protection.

— Findings of the Court

- 96 After Schneider had transferred Legrand to the Wendel/KKR consortium, the notified transaction could not but be regarded as abandoned, and the procedure for the control of that transaction which was resumed by the Commission after the annulment judgments of 22 October 2002 became devoid of purpose, as the Commission noted in its letter of 13 December 2002 closing the procedure.

- 97 By that letter, the Commission thus merely took formal notice of the fact that the object of its control had ceased to exist and informed the applicant that the procedure was formally closed.
- 98 The fact that Schneider did not formally withdraw the initial notification of the transaction is irrelevant to that analysis, since Schneider's abandonment of the transaction was enough to render the control procedure devoid of purpose.
- 99 It does not avail Schneider to rely on the Order in *Compagnia Portuale Pietro Chiesa v Commission*, which was made in relation to the decision to close a complaint concerning infringements of the Community competition rules.
- 100 According to that order and the case-law cited in paragraphs 41 and 42 thereof, the decision not to take further action on a complaint by individuals who are asking the Commission to declare that there has been an infringement of the competition rules and to impose a sanction definitively determines the Commission's position as regards the procedure for investigating that complaint. By contrast, the impugned act closing the procedure does not represent a position adopted by the Commission but merely draws the inevitable consequences from the circumstances of fact which render the control procedure devoid of purpose.

101 Therefore the decision of 13 December 2002 closing the control procedure is not a measure adversely affecting the applicant.

102 It follows that the action must also be dismissed as inadmissible in so far as it relates to the decision of 13 December 2002 closing the control procedure in respect of the transaction.

103 As regards the legal protection which Schneider claims against the unlawful acts which it claims the Commission committed during the control procedure which was resumed following the judgments in *Schneider I* and *Schneider II*, it may be observed, for the sake of completeness, that, as is clear from the account of the background to the dispute, the applicant has already brought an action for compensation for the damage which it claims to have sustained as a result of those unlawful acts.

104 It follows from all the foregoing considerations that the application must be dismissed in its entirety as inadmissible.

## **Costs**

105 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby orders:

- 1. The application is dismissed as inadmissible.**
  
- 2. The applicant is ordered to bear its own costs and to pay those incurred by the Commission.**

Luxembourg, 31 January 2006.

E. Coulon

Registrar

H. Legal

President